IN THE SUPREME COURT
OF FLORIDA

CASE NOS. 95,886 & 00-703

INQUIRY CONCERNING A JUDGE NOS. 99-10 & 00-17
RE: MATTHEW E. MCMILLAN

JUDICIAL QUALIFICATIONS COMMISSION'S REPLY BRIEF

On Review of the
Findings, Conclusions and Recommendations by the
Hearing Panel of the Judicial Qualifications Commission

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PREFACE

Petitioner, the Judicial Qualifications Commission, will be referred to as the "JQC" in this proceeding. Respondent, The Honorable Matthew E. McMillan, was the Respondent below and will be referred to as "Respondent" or "Judge McMillan" in this proceeding. This matter is before this Court on review of the Findings, Conclusions and Recommendations by the Hearing Panel of the JQC entered on January 10, 2001 ("hereinafter referred to as Findings at _____"). Judge McMillan's Response to this Court's Order to Show Cause dated February 20, 2001, will hereinafter be referred to as "McMillan Response at _____." All references to the official transcript of the hearing in this matter will be designated by the prefix "T," followed by the volume and page number within the transcript. For instance, (T:2-4) refers to volume 2 of the official transcript at page 4. All references to the JQC's Appendix in Support of Reply Brief will be designated as "JQC Appendix at _____."

STATEMENT OF THE CASE

This case is before the Court on review of the Findings of the JQC entered on January 10, 2001. That body found that Judge McMillan is presently unfit to hold judicial office and recommended that he be removed. The Hearing Panel's Findings were entered following a trial in the Manatee County Courthouse on October 30 - November 2, 2000. Thereafter, the JQC and Judge McMillan entered into a Stipulation

for Suspension on January 23, 2001, in which the parties stipulated and agreed that Judge McMillan "be suspended with pay pending this Court's disposition of these proceedings . . . ." By order dated January 29, 2001, this Court approved the Stipulation and suspended Judge McMillan with pay, effective immediately.

This case arises out of three groups of charges that were eventually consolidated for trial purposes.[1] *See* JQC Appendix at 1. On June 29, 1999, the JQC filed the first set of charges against Judge McMillan. Those charges stemmed from Judge (then candidate) McMillan's campaign for county judge in 1998 (hereinafter the "election case"). The primary thrust of the election case is that during the campaign for the judicial office which he now occupies, candidate McMillan engaged in pattern of inappropriate conduct in that, *inter alia*, he: i) made pledges and promises of conduct in office that committed or appeared to commit him with respect to cases or controversies that were likely to come before the court; and; ii) made knowingly false or misleading statements concerning his opponent, the incumbent, Judge George Brown.

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[1] By Order dated July 26, 2000, the Hearing Panel ordered that the charges be consolidated. One of the charges dealt with Judge McMillan's actions in a landlord-tenant action styled, *Lohrey v. Eastman*. The Hearing Panel found Judge McMillan not guilty of that charge; hence, it will not be discussed further in this Reply.

In his Answer to the election case, which incorporated motions to dismiss and for a more definite statement, Judge McMillan contended that his campaign literature was based upon truthful and accurate information. He further contended that the Formal Charges were politically motivated by an informal association of judges, lawyers, and politicians in the Manatee County area known as the "Good Ole' Boy Network" who were upset that he had challenged and defeated an incumbent judge. Judge McMillan also argued that the Formal Charges should be dismissed because they failed to properly allege the essential requirements of the law. In a second Motion to Dismiss filed November 29, 1999, Judge McMillan asserted that "the regulations of Canons 1, 2, and 3 do not apply to [his conduct] prior to being sworn in as a judge." By Order dated January 6, 2000, the Hearing Panel denied the motions to dismiss and for more definite statement.

On January 17, 2000, the day prior to the final hearing date of January 18-20, 2000, the Investigative Panel of the JQC, in accordance with Rule 6(j) of the Rules of the Judicial Qualifications Commission, reached a Stipulation with Judge McMillan. By Order dated June 21, 2000, this Court rejected the Stipulation, reasoning that "the interests of justice require that the recommended disposition be rejected and [that] th[e] matter be returned to the Commission for further proceedings on the merits of the issues of misconduct as well as the appropriate discipline."

On March 31, 2000 (while the Stipulation was pending before this Court), the Investigative Panel filed a second Notice of Formal Charges against Judge McMillan (Inquiry No. 00-17). *See* JQC Appendix at 2. The second Notice of Formal Charges concerned Judge McMillan's handling of a first appearance hearing in a case styled, *State of Florida v. Ocura*. In the *Ocura* case, the JQC alleged that Judge McMillan violated Canon 3 of the Code of Judicial Conduct by presiding over a criminal case in which he was a material witness.

SUMMARY OF HEARING PANEL'S FINDINGS

In the election case, the Hearing Panel found Judge McMillan guilty of Charges 1, 3, 4, 5, 6, 7, 8, 9, 10, and 11. He was found not guilty of Charge 2. The charges in the election case can be generally grouped into the three distinct categories. The first category consists of charges (Charges 1 and 4) where Judge McMillan was found to have made inappropriate pledges of conduct in office or statements that committed or appear to commit him with respect to cases, controversies or issues that were likely to come before him in violation of Canons 7(A)(3)(d)(i)&(ii). The JQC will address the sufficiency of the Hearing Panel's findings underlying Charges 1 and 4 in Part I of this Reply.[2]

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[2] Because some of the "improper pledge" charges are based on the same campaign literature as the "knowing misrepresentation" charges, there may be some

The second group of charges (Charges 1, 3, 5, 6, 7, 8, 9 and 10) arises out of circumstances where Judge McMillan was found to have knowingly misrepresented the qualifications, present position, or other fact concerning his opponent in violation of Canon 7(A)(3)(d)(iii) of the Code. Those charges are addressed in Parts II, III, IV, V, VI, and VII of this Reply.

The final category of charges consist of a single charge (Charge No. 11) that Judge McMillan: i) engaged in a pattern of conduct unbecoming a member of the judiciary; and ii) impaired the public's perception of the independence and impartiality of the judiciary by the breadth of his unsubstantiated attacks on the judiciary. That charge will be addressed in Part VIII of the Reply.

Judge McMillan was found guilty as charged in the Ocura case. The Ocura charge will be addressed in Part IX of this Reply. Finally, the Hearing Panel's recommended discipline of removal will be addressed in Part X.

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overlap in discussion of certain of the brochures that were published by the McMillan campaign.

SUMMARY OF ARGUMENT

"The findings and recommendations of the Judicial Qualifications Commission are of persuasive force and should be given great weight." *In re Davey*, 645 So. 2d 398, 404 (Fla. 1994). "Before reporting findings of fact to this Court, the JQC must conclude that they are supported by clear and convincing evidence." *In re Shea*, 759 So. 2d 631 (Fla. 2000). Clear and convincing evidence is an intermediate standard of proof, which is more than a preponderance of the evidence, but less than beyond a reasonable doubt. As this court stated in *Davey*, "[t]he evidence must be credible; the memories of the witnesses must be clear and without confusion; and the sum total of the evidence must be of sufficient weight to convince the trier of fact without hesitancy." *Davey*, 645 So. at 404; *see also Schindler v. Schiavo*, 2001 WL 55481 (Fla. 2d DCA 2001). ("The clear and convincing standard of proof, while very high, permits a decision in the face of inconsistent and conflicting evidence.").

With respect to the Hearing Panel's findings that he made improper pledges of conduct, Judge McMillan contends that the Panel took his statements out of context or that, alternatively, his statements were not intended for public dissemination. As elaborated upon in Part I of the Reply, this argument is undermined in large part by Judge McMillan's own admissions. There is also no requirement that the JQC prove that Judge McMillan made the inappropriate statements with an intent to violate the

canons. Finally, the Code of Judicial Conduct does not allow a judicial candidate the privilege of making statements that violate Canon 7 to private audiences as opposed to the public at large.

With respect to the Panel's findings that he made knowing misrepresentations, Judge McMillan argues that his statements were truthful and, to the extent proven false, not knowingly made. As discussed in Parts II -VII of this Reply, the Hearing Panel's findings are supported by strong evidence, both direct and circumstantial. In the most egregious of the charges of which Judge McMillan was found guilty, Judge McMillan admitted that he slanted his campaign statements regarding the incumbent's "days off from court" to deliberately exclude significant amounts of time the incumbent was performing judicial tasks which did not require his physical presence on the bench. In other instances, the Panel found that Judge McMillan made false representations regarding the incumbent with no reasonable basis upon which to make those statements.

Judge McMillan also argues that his campaign speech was constitutionally protected under the first amendment. This argument is without merit. The canons under which Judge McMillan was found guilty are constitutional, both facially and as applied. The courts which have construed canons such as Florida's present canons have recognized that judicial candidates are different from other political candidates

and that first amendment protections, albeit compelling, must be balanced against the public's interest in judicial neutrality and independence. Moreover, there is no constitutional protection for knowingly false and misleading speech.

Judge McMillan's also indirectly attacks the Hearing Panel's finding of guilt in the Ocura case. Although he admits that in retrospect, he should not have presided over Mr. Ocura's first appearance since he was a material witness in the case, he argues that the JQC improperly questioned his candor and "sinister intent." This argument is largely academic. Irrespective of his motive in presiding over Mr. Ocura's first appearance (which was clearly established), the fact remains that Judge McMillan's conduct was grossly inexcusable, particularly since it occurred at time when he was already the subject of another pending disciplinary recommendation to this Court arising out of his misconduct in the election case.

Finally, Judge McMillan attacks the evidentiary basis for the Hearing Panel's recommendation of removal. In particular, he argues that the JQC failed to prove present unfitness by clear and convincing evidence. The Panel's recommendation should be considered in light of Judge McMillan's inability to rehabilitate himself; the Panel's finding that he orchestrated a deliberate campaign to misrepresent the incumbent's record and prey on the lay public's understanding of how the court system operates; and his lack of genuine remorse. Aside from generalized assertions

that the JQC failed to prove present unfitness, Judge McMillan has cited no authority indicating how the Hearing Panel exceeded the authority granted it under Art. V, section 12(a)(1) of the Florida Constitution to recommend appropriate discipline to this Court.

ARGUMENT

I. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NOS. 1 AND 4 WHERE THE EVIDENCE DEMONSTRATED HE LED VOTERS TO BELIEVE THAT HE WOULD NOT FAITHFULLY AND IMPARTIALLY PERFORM HIS DUTIES

Charge No. 1 of the election case was predicated on a letter Judge McMillan wrote to law enforcement officers during his campaign entitled, *"A Fellow Police Officer Speaks Out,"* in which he stated, among other things:

> Judge Brown has never been a friend to law enforcement in the Courtroom," and further invited law enforcement officers to "imagine a judge who [would] go to bat for [them].

See JQC Appendix at 4. The JQC also charged that in the same letter, Judge McMillan told law enforcement officers they had the opportunity to "support a fellow police officer who has been there and [would] go to bat for [them]" as opposed to simply pledging or promising the faithful and impartial performance of his duties in office.

Judge McMillan testified that this letter was "probably the most unfortunate thing [he] did during [the] campaign." (T:1-116). When questioned regarding his

statement that law enforcement officers had the "opportunity to support a fellow police officer[3] who ha[d] been there and w[ould] go to bat for [them]," he initially responded that he thought law enforcement officers understood what he meant, but then conceded that the statement could be interpreted as showing a predisposition towards law enforcement. (T:1-117). In his Response, he reiterates that "the letter was a grave error in judgment." *See* McMillan Response at 12.

Despite his apparent remorse, Judge McMillan nonetheless argues that his "go to bat" comment was motivated by a proper intent. *See* McMillan Response at 13. Intent is not a defense to a violation of Canons 7(A)(3)(d)(i) and (ii). If a violation of those canons required some demonstration of malevolence as Judge McMillan suggests, judicial candidates could violate those canons with impunity by simply arguing that they were well-intentioned.

Equally unavailing is Judge McMillan's defense that his statement was made "to a small group of police officers" and "not meant for the public in general." *See* McMillan Response at 13. There is no exception under the canons for improper pledges made to private audiences, as opposed to the public at large. "In determining whether a judge has conducted himself in a manner which erodes public confidence

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[3] Judge McMillan testified that he is a former police officer. (T:1-114).

in the judiciary, [the court] must consider the act or wrong itself ***and not the resulting adverse publicity***." *In re LaMotte*, 341 So. 2d 513, 518 (Fla. 1977) (emphasis added).[4]

Charge No. 4 arises out of another instance where the Hearing Panel found Judge McMillan attempted to portray himself as a pro-prosecution/pro-law enforcement candidate for judicial office. Charge No. 4 is predicated upon a letter Judge McMillan sent to Earl Moreland, the State Attorney for the Twelfth Judicial Circuit (copied on the media), in which he stated, "***I believe I will always have the heart of a prosecutor***," coupled with the following statement he made in a packet of materials to the editorial board of the *Bradenton Herald*:[5]

> I will not rubber stamp the deals the prosecutors and defense attorneys work out. I suspect *defense attorneys will be quite unhappy with me as a judge.*

See JQC Appendix at 5. The Hearing Panel determined that "[t]he statement that he would always have the 'heart of a prosecutor' would certainly leave the average person

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[4] The Panel's finding that Judge Brown had not called in favors from Sheriff Wells or others in Manatee County was not essential to a finding of guilt under Charge No. 1. This finding actually related more to Charge No. 3's allegations concerning knowing misrepresentations.

[5] The packet of materials was admitted into evidence as JQC Exhibit 5. *See* Tab 9. Because of its voluminous nature the packet has not been included in the JQC's Appendix.

and indeed any legally-trained person to believe that Judge McMillan would side with law enforcement and the prosecution while on the bench." *See* Findings at 23.

In defending his "heart of a prosecutor" comment, Judge McMillan contends that the statement was made in a private communication to Earl Moreland and "was never intended . . . to be distributed to the public." As a corollary, he argues that his "heart of a prosecutor" comment should not be taken literally because he wrote the letter to Mr. Moreland in response to rumors and misinformation that were being spread about him and it was not his intention to convey that he would not rule from the bench impartially, if elected. *See* McMilllan Response at 17-21. For the reasons previously expressed, Judge McMillan's "private audience" distinction is not justification for having made statements which committed or appeared to commit him to the prosecution/law enforcement side of cases. It is equally settled that the conduct of others does not provide any justification for him to violate his ethical duties as a judicial candidate. *See In re Graham,* 620 So. 2d 1273, 1275 (Fla. 1993) (holding that the misconduct of others does not justify a "related departure from the guidelines established in the Code of Judicial Conduct.").

II. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NO. 3 WHERE THE EVIDENCE DEMONSTRATED HE FALSELY ASSERTED THAT JUDGE BROWN PRESSURED AND SOUGHT PREFERENTIAL TREATMENT FROM LAW ENFORCEMENT

Charge No. 3 is based upon the same letter entitled, "*A Fellow Police Office Speaks Out,*" which was the subject of Charge No. 1. With respect to Charge No. 3, the Hearing Panel concluded Judge McMillan was guilty of violating Canons 1, 2(A), 7(A)(3)(a), and 7(A)(3)(d)(i)-(iii) because he "falsely or misleadingly asserted that Judge Brown . . . exerted pressure upon . . . Sheriff Charlie Wells not to support [him] and that Judge Brown pressured law enforcement officers for preferential treatment for his children when they were arrested." *See* Findings at 8.

Judge McMillan now claims that "the literature . . . never says that George Brown pressured Sheriff Wells;" instead, "[i]t simply states that Wells was pressured." *See* McMillan Response at 14. This argument is tenuous. The letter's clear implication is that Judge Brown, or others at his direction, exerted pressure on Sheriff Wells to support him and not Judge McMillan. Sheriff Wells testified that Judge Brown did not exert any pressure on law enforcement to support him in the campaign. (T:3-371-372). When asked whether he was aware of any factual basis for asserting that Judge Brown had exerted pressure on law enforcement to endorse his candidacy, Tom Nolan, Judge McMillan's campaign consultant, responded, "I don't know that he did." (T:8-1069).[6]

[6] Judge McMillan testified that his statements regarding Judge Brown "calling in favors" and exerting pressure was based on statements made to him by a

Judge McMillan relies heavily upon the testimony of Deputy Dawn Atkinson in support of his claim that Judge Brown sought preferential treatment for his children when they were arrested. (T:9-1422). Deputy Atkinson testified that several years ago, she responded to a complaint at the Brown home from a neighbor concerning an incident between the neighbor's child and one of Judge's Brown's sons. (T:5-708-710). The incident did not involve any type of criminal activity and appeared to involve only horseplay between the children. (T:2-250). It is undisputed that Judge Brown's son was never arrested as a result of the incident nor were charges ever filed. (T:2-253).

As part of her investigation, Deputy Atkinson took a statement from the neighbor. (T:5-708-709). She did not take a statement from anyone in the Brown family. (T:5-725). Sometime after Deputy Atkinson left the Brown home, she received a phone call from Judge Brown. (T:5-710-712). She testified, however, that the only thing Judge Brown did when he called was express concern that she had taken a statement from only one party to the incident (the neighbor) and had not spoken to any member of the Brown family. (T:5-726). Deputy Atkinson testified that Judge Brown

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politically active individual in Manatee County named Paul Scharff. (T:1-124-25). The Panel found that although the evidence as to what Mr. Scharff said to Judge McMillan may have been in conflict, Judge McMillan had no actual personal knowledge of any improper conduct by Judge Brown when he made the statements. *See* Findings at 19.

did not ask her to do anything, nor did he ask her or anyone else at the Sheriff's Department for preferential treatment for his son. (T:5-726-728). Sheriff Wells similarly testified that neither Judge Brown nor any member of his family had ever sought or received preferential treatment, and he felt it was untruthful to have asserted so. (T:3-372).

Based upon the evidence, the Hearing Panel concluded that "there was no reasonable basis for Judge McMillan to believe that Judge Brown was guilty of asking this officer for favorable treatment of his son who in fact had not been arrested and was not even spoken to by the police on the night in question." *See* Findings at 22. Judge McMillan now attacks the Hearing Panel's conclusion that there was no information he could have reasonably relied upon. As discussed below, the Panel's conclusion rests upon a sound evidentiary basis.

In response to questioning by one of the Panel members, Judge McMillan testified that aside from rumors (which he did not rely upon), the sole basis for his statement that Judge Brown had pressured law enforcement to give his children preferential treatment was the story Deputy Atkinson told him concerning the phone call she received from Judge Brown. (T:9-1417). When asked precisely what Deputy Atkinson told him, Judge McMillan was vague and could not recall. *Id*. In a sudden turnabout, Judge McMillan then attempted to distance himself from his statement

regarding preferential treatment by testifying that he had not actually accused Judge Brown of seeking preferential treatment for his children, but instead was only repeating what law enforcement officers had told him. The following colloquy then occurred:

> *Q. Are you suggesting this was not an accusation, sir?*
>
> *A. People c[a]me to me with these stories.* ***I didn't accuse him of that. I said, "This is what you've told me."***

(T:9-1422) (emphasis added). Based on this testimony, it is clear that Judge McMillan had no basis, much less personal knowledge, that Judge Brown had ever sought preferential treatment for his children when they were arrested. His belated attempt to disavow his statement under the guise of having repeated something he was told is further evidence of his reckless behavior. The Code of Judicial Conduct expressly provides that "[a] person's knowledge may be inferred from circumstances." *See* Definitions Section, Code of Judicial Conduct. Under the circumstances presented, the Hearing Panel was certainly justified in concluding that Judge McMillan knowingly misrepresented that Judge Brown had sought preferential treatment for his children when they were arrested.

III. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NO. 5 WHERE THE EVIDENCE DEMONSTRATED HE GAVE THE FALSE IMPRESSION THAT UNPAID FINES AND COURT COSTS WERE DIRECTLY TO ATTRIBUTABLE TO THE CONDUCT OF HIS OPPONENT

Charge No. 5 in the election case is predicated on a campaign brochure entitled, *New Hope For Law Abiding Citizens.* *See* JQC Appendix at 8. In this brochure, Judge McMillan made the following statement:

> **Make convicted offenders pay their fines and court costs or face jail time.**
>
> Manatee County has lost over 12 million dollars . . . in the last ten years when fines and court costs have been reduced at the end of probation. As a consequence, offenders are having a good laugh at our expense.

Although Judge McMillan was running for a seat on the county court bench, the brochure did not distinguish between unpaid fines and court costs arising out of circuit court/felony matters versus those arising out of *county court* matters. It is undisputed that before Judge McMillan published this brochure, he was aware that the 12 million dollar figure in uncollected fines and costs included uncollected fines and costs from both the circuit court and county court. (T:1-162).

Against this backdrop, the Panel concluded that "[o]bviously, Judge McMillan was running for [a] County Court seat" and that "the brochure was a knowing attempt at attributing these supposed defects in the collection system to Judge Brown." Judge McMillan takes issue with the Panel's finding that this brochure constituted a knowing misrepresentation concerning Judge Brown because "no where in the entire brochure is Judge Brown even mentioned." *See* McMillan Response at 22. Despite Judge

Brown's name not appearing in the brochure, however, there was sufficient circumstantial evidence for the Panel to conclude that the brochure was intended as an attack on Judge Brown. Judge McMillan had published several other pieces of campaign literature in which he specifically criticized Judge Brown in the context of uncollected costs and fines.[7]

Judge McMillan also contends that the Hearing Panel has impermissibly sought to curtail speech on "the right of the people to question the administration of their government," and has denied him the right to "criticize the administration of justice." *See* McMillan Response at 22-23. This is not so. The Hearing Panel found Judge McMillan's attack on unpaid fines and court costs of the Manatee County court system to be an unfair misrepresentation of facts as they related to the incumbent. Neither the Investigative Panel nor the Hearing Panel ever sought to apply Canon 7A(3)(d) to administrative matters. Indeed, the commentary to Canon 7 clearly states:

> Section 7A(3)(d) does not prohibit a candidate from making pledges or promises respecting improvements in court administration.

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[7] For instance, in his submission to the *Bradenton Herald* editorial board, Judge McMillan claimed, "*Unlike my opponent*, I will ensure that offenders pay us their Fines and Court Costs." *See* JQC Exhibit 5 (cover page).

Moreover, Judge McMillan's reliance on *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Ky. 1991) is misplaced. The administrative issues in that case as to which comments were held constitutionally permitted related to the backlog of cases, methods of assignments of cases, numbers of pending cases, hiring and firing of employees, and administrative expenses relating to travel. Clearly those were not the types of substantive issues which concerned the Hearing Panel as to Charge 5. It is worth noting that Mr. Ackerson made no claim of entitlement to make pledges or promises of adjudicatory conduct should he be elected, *id*. at 312, and the court specifically upheld the limitation on campaign statements committing or appearing to commit him with respect to legal issues that were likely to come before the court to which he sought election. *Id*. at 314.

The conduct at issue here is not a dispassionate discussion of court administrative matters but is a sharp, unfair and knowingly false attack on the incumbent, which is a clear violation of 7A(3)(d). It was correctly condemned by the Hearing Panel just as this Court has previously censured judges for their attacks on other judges and the judicial system because of the intemperate, unfair and inaccurate nature of their positions taken on court administrative matters. *See, e.g. In re Kelly*, 238 So. 2d 565 (Fla. 1970); *In re Miller*, 644 So. 2d 75 (Fla. 1994).

IV. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NOS. 6 AND 7 WHERE THE EVIDENCE DEMONSTRATED HE MADE A KNOWING MISREPRESENTATION REGARDING THE INCUMBENT'S WORKING HOURS

Charge No. 6 arose out of a brochure entitled "*16-Year Judge Brown Treats Crime Like a Part-Time Problem*" (hereinafter "Part-Time Judge brochure") and other written statements, including statements Judge McMillan made in a submission to the editorial board of the *Bradenton Herald*.[8]

On the front of the Part-Time Judge brochure printed in large white letters against a green background were the words: "16-YEAR JUDGE BROWN TREATS CRIME LIKE A PART-TIME PROBLEM." As the reader opened the brochure, the McMillan campaign made the following claims regarding Judge Brown's work ethic:

Manatee County Court records prove that:

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[8] *See* JQC Appendix at 7. This brochure was admitted into evidence as JQC Exhibit 4. In a packet of materials Judge McMillan submitted to the editorial board of the *Bradenton Herald*, he stated that "[c]ourt records indicate Judge Brown takes an average of 86 days off per year from county court" and that "[u]nlike his opponent, [he] [would] put in a full week's worth of work." *See* JQC Exhibit 5 at Tab 9.

In an editorial which he submitted to the *Bradenton Herald* 4 days prior to the election (JQC Appendix at 9), Judge McMillan reiterated his claim that Judge Brown took 84 days off from county court in 1997. He claimed that 26 of those days were Fridays.

> * For the last four years 16-year incumbent Judge George Brown has served in the criminal court, he has averaged only 14 hours a week on the bench.
>
> * In 1997 he took 84 days off from court and in 1996 he took 86 days off from court.
>
> * We hear all the time how overloaded our court system is, and it's no wonder with working hours like that.
>
> * But, what's even more amazing, we pay him over $98,000 a year to do this job.
>
> * After 16 years on the bench, it's time for someone new!

(emphasis in original).[9]

In what the Hearing Panel described as "perhaps the most serious issue" in the campaign, it found that Judge McMillan made a serious and knowing misrepresentation regarding Judge Brown's working hours. Specifically, the Panel found that the 84 and 86 "days off from court" statements were intentional and knowing misrepresentations. *See* Findings at 27. The Panel also found that contrary to the brochure, the Manatee County court system was *not* overloaded and that Judge McMillan's campaign

[9] Charge No. 7 is predicated on Judge McMillan's claim in the same brochure that the Manatee County court system was overloaded because of Judge Brown's working hours. Judge McMillan was found guilty of that charge.

literature gave the impression that the overloaded court system was the result of Judge Brown's working hours.[10] *Id*.

A. Judge McMillan's Calculation of Judge Brown's 84 and 86 Days Off From Court in 1996 and 1997 Was Intentionally Misleading to Voters.

In order to fully appreciate the deception underlying Judge McMillan's claim that Judge Brown took 84 "days off from court" in 1997 and 86 "days off from court" in 1996, one must first understand how the McMillan campaign manipulated the phrase "days off from court" to make it appear as though the incumbent was actually not working those days. For purposes of calculating the 84 and 86 days, Judge McMillan testified that he considered a "day off from court" any day "that [Judge Brown] did not hold county court dealing with county court functions." (T:1-144). Thus, the McMillan campaign counted as "days off from court" any time that Judge Brown spent: i) handling matters in chambers; ii) handling any duties or responsibilities as the county administrative judge;[11] iii) handling any duties as a designated circuit judge; or

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[10] Judge McMillan conceded that the Manatee County court system was not overloaded. He testified that this statement should not have been included in his campaign literature and blamed it on a printing error by Tom Nolan, his campaign consultant. (T:1-141-42).

[11] Judge Brown was the county administrative judge for all of his sixteen years on the bench. (T:2-283).

iv) handling first appearance hearings (or advisories). (T:1-144-45).[12] Judge McMillan admitted that he made an intentional decision to include the time Judge Brown spent in court handling first appearances as part of the "days off" calculation. (T:8-1272).

Judge McMillan's testified that he did not consider first appearances a county court function because "every judge [including circuit judges] has to do advisories . . . ." (T:1-146). This argument is dubious on several fronts. First, it is absurd to posit that county judges are not performing a "county court" function when they conduct first appearances simply because circuit judges can also perform the same task. Terry Turner, Clerk of the Circuit Court for Manatee County, rejected this very logic in his testimony:

> *Q. And would you agree that when a county court judge is handling first appearances, that he is in fact working?*
>
> *A. Yes, sir.*
>
> *Q. Would you agree when a judge is handling first appearances, he is not off from court?*
>
> *A. No, it's considered court.*
>
> . . .

[12] Throughout the trial, witnesses sometimes referred to first appearances as advisories. The terms are synonymous. (T:2-296).

> *Q. Do you agree that it would be a false representation to tell the general public that a judge is off from court if that judge is in fact handling first appearances?*
>
> *[Objection - Overuled]*
>
> ***A. I agree that would be a misrepresentation.***

(T: 3-417-419) (emphasis added).

Judge McMillan's refusal to admit that Judge Brown was in court when he handled first appearances is also disingenuous because he conceded that in using the 14 hours per week figure in the brochure as the average number of hours Judge Brown spent on the bench, ***he attributed 2 of those 14 hours to time that Judge Brown spent handling first appearances***. When asked why he included the time Judge Brown spent in first appearances for purposes of calculating the number of *hours* he spent on the bench, but excluded first appearances when calculating the number of *days* he was on the bench, Judge McMillan was unable to offer an intelligible response. (T:1-145-47). Even assuming that the fictional distinction he manufactured did have some subjective meaning, however, the Panel properly found that "[h]e had no explanation as to how the voters would have found this meaning within the brochure." *See* Findings at 28.

Judge McMillan next argues that "[t]he electorate is intelligent enough to weigh the language in the brochure 'on the bench' and 'days off from court' when it

questioned the literature."[13] *See* McMillan Response at 27. In making this assertion, Judge McMillan apparently disregards the testimony of his own witnesses, who testified that the most reasonable interpretation of "days off from court" was that the incumbent was actually not working 86 and 84 days in 1996 and 1997, respectively. For instance, in response to questioning from one of the panel members, Tom Nolan, Judge McMillan's campaign consultant, testified as follows:

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[13] Some years ago, in *Thatcher v. United States*, 212 F. 801, 810 (6th Cir. 1914), the United States Court of Appeals for the Sixth Circuit rejected similar reasoning:

> "We have sufficiently reviewed the circular . . . The argument that it is not libelous or is not untruthful depends upon the mistaken view that it cannot be condemned if skilled dialecticians can point out how each sentence or half sentence, standing alone, is not necessarily inconsistent with the facts. It is impossible to consider such a publication from that standpoint. *It was drafted by Mr. Thatcher and his associates, skilled in the nice use of language and the leading of pegs where on they might hang technical justifications; it was prepared and published to be read by and to influence a class in the community not skilled at those things and which would take it to mean what it seemed to mean; and it must be read against its composers with the same meaning which they intended its readers should draw*.

Id. (emphasis added).

> *Q. But the message you intended to drive home to readers of this document [Part-Time Judge brochure] is that in one year he [Judge Brown] was not at work 84 days and the other year he was not at work 86 days?*
>
> *A.* ***That's correct.***
>
> *Q. And that's what you intended to communicate –?*
>
> *A. Yes.*
>
> *Q. – didn't you? And you did that with the approval of Judge McMillan, did you not?*
>
> *A.* ***He approved it, it went out.***

(T:7-1134-1135); *see also* Findings at 28. Similarly, Jesse Carr, another adviser to the McMillan campaign, when asked whether he thought the reference to the 84 days "off from court" meant that Judge Brown was not at work that many days, testified that, "Evidently, that's what it means." (T:8-1327).[14]

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[14] Much of Judge McMillan's defense below was that his campaign was simply trying to educate voters how Judge Brown manipulated his calendar to maximize the amount of free time he would have. The JQC agrees with Judge McMillan that "t[h]e experience and work habits of the incumbent are only some of the few areas upon which a candidate for judicial office may campaign." *See* McMillan Response at 26. What Judge McMillan fails to acknowledge, however, is that any such comment must be truthful and not purposely designed to mislead voters.

Directly on point is the court's decision in *In the Matter of Bybee*, 716 N.E. 2d 957, 963 (Ind. 1999). There, the incumbent was wrongfully attacked for holding cases under advisement for months at a time and causing needless delays. As the court noted in upholding a recommended reprimand:

Finally, throughout the trial and in his Response to this Court's Show Cause Order, Judge McMillan has maintained that he at all times tried to give Judge Brown the benefit of the doubt. He continues to maintain that several of the errors in his campaign literature are attributable to erroneous information he received from third parties such as the Clerk's Office or Probation Department. As Special Counsel summarized in closing argument, however, even if one takes only the information available to Judge McMillan, it is readily apparent that he made no bona fide effort to tell the truth. This is easily demonstrated by two of the exhibits he introduced into evidence pertaining to Judge Brown's time in court in 1997.

Judge McMillan testified that the 84 days which Judge Brown allegedly took "off from court" was compiled from McMillan Exhibit 10 (JQC Appendix at 11),

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> The majority of the Masters concluded . . . that Respondent's disingenuous use of her brochure was a knowing misrepresentation . . . Respondent's principal assertion in reply to the findings is that the brochure was basically true in a literal sense. . . Nevertheless, we are in accord with a specific conclusion of the majority of the Masters that campaign innuendo or equivocal statements designed to raise doubts about a judge destroy public confidence in the judicial office. By the selective use of antidotal information and statistics, Respondent was trying to create the false impression that Judge Clem was holding needless delays and holding large numbers of cases under advisement despite her knowledge to the contrary.

which is entitled, "1997 Court Time - Judge George Brown." (T:8-1264). In addition, Susan McMillan testified that McMillan Exhibit 11 (JQC Appendix at 12), entitled, "1997 Advisory Docket - Judge George Brown" is a list of first appearance (or advisories) that the McMillan campaign believed Judge Brown handled during 1997. (T:6-897-98). As demonstrated by the illustration shown in the JQC's Appendix at Tab 14, taking into consideration only the days which Judge McMillan acknowledged Judge Brown was working (the first appearance days are shown in yellow and all other workdays shown in blue) ***Judge McMillan's own exhibits demonstrate that Judge Brown was off work a total of 23 days in 1997, not 84 days,*** excluding legal holidays on which the Manatee County Courthouse was officially closed.[15] Thus, there was more than sufficient clear and convincing evidence to support the Hearing Panel's finding that Judge McMillan knowingly misrepresented the incumbent's working hours.

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[15] This identical illustration was presented to the Hearing Panel during closing arguments. This illustration also reflects that Judge Brown was only off on 7 Fridays during 1997, 4 of which were legal holidays, as opposed to the 26 Fridays which the McMillan campaign claimed he was off in its editorial to the *Bradenton Herald*. *See* JQC Exhibit 9.

V. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NO. 8 WHERE THE EVIDENCE DEMONSTRATED HE MADE A KNOWING MISREPRESENTATION REGARDING THE INCUMBENT'S FAILURE TO ENFORCE A GEOGRAPHICAL RELOCATION STATUTE[16]

In Charge No. 8, the JQC alleged that in violation of Canons 1, 2(A), 7(A)(3)(a) and 7(A)(3)(d)(i) - (iii), Judge McMillan made a knowing misrepresentation regarding the incumbent's sentencing practices with respect to prostitution cases in a packet of materials he furnished to the editorial board of The *Bradenton Herald*. In the referenced materials, Judge McMillan accused Judge Brown of being ineffective in prostitution cases and stated that his method of sentencing offenders ensured that "the legal system [was] wasting it's [sic] time." [17] Specifically, Judge McMillan stated that:

> ***Judge Brown has consistently failed to enforce the geographical relocation provision***, which allows a judge to enjoin a prostitute from returning to the vicinity where she was arrested.
>
> As a judge, I will see to it that prostitutes and johns are punished in a manner that will ensure they take our justice system seriously. ***I will enforce the geographical***

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[16] There were initially two violations alleged in Charge No. 8. At the beginning of the trial, the JQC dismissed the portion of Charge No. 8 which pertained to Judge McMillan's criticism of Judge Brown's sentencing practices with respect to violation of probation in domestic battery cases. (T:1-59).

[17] *See* JQC Exhibit 5 at Tab 8.

> ***relocation statute***, and I will order mandatory treatment and urinalysis when appropriate.

Id.

The Hearing Panel found that Judge McMillan made an intentional and knowing misrepresentation by stating that Judge Brown failed to enforce the geographical relocation statute. *See* Findings at 30. When asked about the geographical relocation statute at trial, Judge Brown testified as follows:

> *Q. Is it true that you have failed to enforce the geographical relocation statute in prostitut[ion] cases.*
>
> *A. No.*
>
> *Q. To the best of your knowledge, what is the geographical relocation statute?*
>
> *A.* ***To the best of my knowledge, it does not exist.*** *There's no statute - - Florida statute or federal law or local ordinance - - called a geographical relocation statute. I researched the matter, and the best I can determine, it does not exist as a statute or law. This implies that I'm not following a law.*

(T:2-266) (emphasis added).

Judge McMillan now concedes there is neither a geographical relocation statute nor ordinance in Manatee County, but instead what he refers to as "a well-established protocol in place." *See* McMillan Response at 45. Rather than acknowledge he made a knowing misrepresentation, however, he instead criticizes the JQC for failing to put

him on proper notice of the charge against him. This argument misses the mark. Irrespective of the specific language in the charge, the fact remains that no geographical relocation statute exists. As a trained lawyer, Judge McMillan could have easily confirmed the nonexistence of such a statute through simple research. Accordingly, there was clear and convincing evidence to support the Panel's determination.

VI. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NO. 9 WHERE THE EVIDENCE DEMONSTRATED HE MADE A KNOWING MISREPRESENTATION THAT JUDGE BROWN HAD "REQUIRED NO JAIL TIME" IN SENTENCING A CRIMINAL DEFENDANT

Charge No. 9 of the election case arose out of the packet of information Judge McMillan submitted to the *Bradenton Herald* editorial board. In the materials, Judge McMillan was critical of Judge Brown's sentencing in domestic battery cases, essentially stating that Judge Brown was too lenient on offenders. As an example of Judge Brown's leniency, the materials emphatically stated that Judge Brown had required no jail time in sentencing one defendant in particular, Vincent Born. (JQC Exhibit 5 at Tab 4). As the Panel found, however, " Born had, [in fact], served 55 days in jail and Judge Brown had recognized this and sentenced him to the 55 days he had already served." *See* Findings at 30; (T:2-260-63).

Judge McMillan admitted that his representation regarding Mr. Born was not true; however, he attributed the error to an honest mistake made by his wife, Susan McMillan, who did the research on the Born case. (T:1-135-37). Susan McMillan testified that she obtained Vincent Born's name from a list of offenders Judge Brown had allegedly failed to sentence to jail. (T:5-832). She obtained a police report on Mr. Born, which indicated that Judge Brown had sentenced Born to "credit-for-time-served." *Id*. Mrs. McMillan testified that she then called the county probation department to inquire about Born and was told that he had not served any time in jail. *Id*.

The Hearing Panel considered this testimony and concluded that the McMillan campaign should have been aware that the phrase "credit-for-time-served" in the police report "indicated that [Born] had spent some time in jail." *See* Findings at 31. One of the Panel members, in fact, questioned Mrs. McMillan as to why she had not called the jail to inquire into the number of days Mr. Born had spent in jail rather than relying on the probation department which would not have the actual jail records. (T:6-963). Mrs. McMillan testified that she did not realize jail time counted until a defendant was actually sentenced and she "didn't put all that together." *Id*. Given the several other reckless misrepresentations by the McMillan campaign, it was certainly within the Panel's prerogative to conclude that the McMillan campaign acted purposely in

misrepresenting the facts surrounding the Born case, notwithstanding Mrs. McMillan's explanation.[18]

VII. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE N0. 10 WHERE THE EVIDENCE DEMONSTRATED HE MISREPRESENTED JUDGE BROWN'S RECORD IN CONDUCTING JURY TRIALS

In Charge No. 10 of the election case, the Hearing Panel found that Judge McMillan violated Canons 1, 2(A), 7(A)(3)(a), 7(A)(3)(d)(i) - (iii), by distributing a brochure entitled "*16-Year Incumbent Judge George Brown Gives Criminals a Good Deal*" in which he stated that Judge Brown is "soft on crime" because :

> Court records show Judge Brown gives criminals such light sentences that of 91,000 cases, only 300 people asked for a jury trial.

Judge Brown testified that the McMillan campaign obtained the figure of 91,000 cases from Brown's campaign materials. In explaining why he felt it was misleading to suggest he was soft on crime because only 300 persons had asked for jury trials out

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[18] Mrs. McMillan's claim that she did not realize jail records might provide more accurate information as to whether Vincent Born had actually served any jail time was similar to Judge McMillan's explanation as to why he had not inquired of the court administrator's office whether there was a list of official court holidays before compiling his Exhibit 10 in which he included official court holidays as part of Judge Brown's 84 "days off from court" in 1997. Despite having previously worked as an assistant state attorney in Manatee County, Judge McMillan testified that he did not know such a list existed. (T:8-1267).

of the 91,000 cases, Judge Brown explained that Judge McMillan was making an apples-to-oranges comparison because the 91,000 cases included both civil and criminal matters. He further explained that in county court, "only a small percentage of cases are entitled to a jury trial" and that he was sure he had tried thousands of nonjury trials during his 16-year career. (T:2-276).

Judge Brown continued that in the criminal context, because of the effect of negotiated plea agreements and other circumstances beyond a judge's control, it was not unusual for him to have 70-80 cases on his docket at the beginning of his trial week but ultimately have only one or two jury trials:

> because in the very end the State decides to decline [prosecution] or the defendant pleads guilty to the charge, or some perhaps reduced charge is agreed upon, or sometimes for val[id] reasons some percentage of the cases – the caseload, hopefully a small percentage is continued. So it's possible to end up with very few cases that actually go through a full jury trial.

(T:2-277-78). Based on this and other evidence, the Hearing Panel found that "the evidence was clear that the 300 requests for jury trials were not related to the 91,000 figure and that these statistics were most certainly not a reasonable basis upon which to condemn the actions and record of the incumbent." *See* Findings at 31.

Judge McMillan contests this finding on the ground that he was not aware that the 91,000 figure included civil cases and there was "no independent evidence

presented that refuted [his] interpretation, and no evidence presented that the public was misled or that he created his brochure with the intent to mislead." *See* McMillan Response at 51. This rationale does not withstand scrutiny. Even assuming arguendo that Judge McMillan believed the 91,000 cases included only criminal matters, having served as both a prosecutor and criminal defense lawyer, he was nonetheless aware that several factors influence whether a criminal case is actually tried before a jury. Indeed, Judge Brown testified that there is a multitude of cases falling within the county court's jurisdiction for which the defendant is not even entitled to a jury trial. (T:2-276). To suggest to the public that a judge's reputation for leniency on defendants is the *only* reason he or she has tried a small percentage of criminal jury trials is simply irresponsible and deliberately misleading.

VIII. THE HEARING PANEL PROPERLY FOUND JUDGE MCMILLAN GUILTY OF CHARGE NO. 11 WHERE THE EVIDENCE DEMONSTRATED HE ENGAGED IN A PATTERN OF CONDUCT UNBECOMING A MEMBER OF THE JUDICIARY

In Charge No. 11 of the election case, the Hearing Panel found that Judge McMillan, by virtue of the eight charges of which he was found guilty, engaged in pattern of conduct unbecoming a member of the judiciary, which had the effect of bringing the judiciary into disrepute in violation of Canons 1, 2(A), and 7A(3)(a). Judge McMillan contests the Hearing Panel's finding on the ground that his

misconduct stems from but one activity – the use of his campaign literature – and that the JQC has " arbitrarily stretched [that single activity] into 11 charges, deceptively painting a picture of a continuing, deliberate, ongoing pattern of judicial misconduct." *See* McMillan Response at 52. Judge McMillan also contends that the Panel failed to give proper consideration to the "highly-charged" atmosphere in which he was forced to run for election. Neither of these arguments undermines the Hearing Panel's conclusion.

Paragraph 11 of the Formal Charges is not redundant nor does it constitute an improper attempt to "stretch" the charges against Judge McMillan to create an additional basis for guilt. As the panel recognized, this Court held in *In re Kelly* 238 So. 2d 565 (Fla. 1970), that:

> Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by ***evidence of accumulation of small and ostensibly innocuous incidents which, when considered together,*** emerge as a pattern of hostile conduct unbecoming a member of the judiciary.

Kelly, 238 So. 2d at 566 (emphasis added); *see also In re Crowell*, 379 So. 2d 107, 110 (Fla. 1979); *In re Graham*, 620 So. 2d 1273, 1276 (Fla. 1993).

Canon 2(A), which Judge McMillan was found to have violated, provides that:

> A judge shall respect and comply with the law and shall act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

The commentary to Canon 2(A) provides that "irresponsible or improper conduct by judges erodes public confidence in the judiciary" and that judges "must avoid all impropriety and appearance of impropriety." Art. V, section 12(c)(1) of the Florida Constitution further provides that the supreme court may order that judges be subject to discipline for, among other things, "conduct unbecoming a member of the judiciary." As reflected in the supreme court's opinion in *Kelly* and its progeny, it is precisely the cumulative nature of acts of misconduct or the totality of the circumstances which gives rise to a finding that a judge or candidate for judicial office has engaged in conduct which is unbecoming a member of the judiciary. Accordingly, there was sufficient clear and convincing evidence to support the Hearing Panel's finding.

IX. THE HEARING PANEL PROPERLY FOUND THAT NEITHER THE CANONS NOR THE CHARGES INFRINGE UPON JUDGE MCMILLAN'S CONSTITUTIONALLY PROTECTED SPEECH

In arguing against the Hearing Panel's Findings, Judge McMillan contends that the judiciary is not immunized from attacks on its effectiveness and that Canon 7 was unconstitutionally applied in the instant case in part because it curtails his free speech right to make erroneous comments. *See* McMillan Response at 52-53, 66-67.

The Hearing Panel specifically rejected such arguments and concluded the restrictions on Florida judicial elections imposed by the Florida Canons did not unconstitutionally violate protected free speech. *See* Findings at 39-40. The Hearing Panel was correct. The current canons of Florida's Code of Judicial Conduct, adopted in *In re Code of Judicial Conduct*, 643 So. 2d 1037 (Fla. 1994), are constitutional facially and as applied here. The canons recognize the constitutional necessity that restrictions on judicial campaigns be narrowly tailored and serve compelling state interests.

The Canons and the case law construing and applying them also recognize that judicial elections are and must remain very different than campaigns for mayors, sheriff or legislative bodies. The necessity for establishing and maintaining this fundamental different is obvious, as this Court explained when it rejected a constitutional challenge to the prohibition against sitting judges publically endorsing candidates for judicial office in *In re Code of Judicial Conduct Canons 1, 2 and 7A(1)(b),* 603 So. 2d 494 (Fla. 1992). Judges must be impartial since they deal with unique individual cases as opposed to broad programs or sweeping legislative schemes. When a judicial candidate makes a statement regarding his or her beliefs on an important issue likely to come before the court and is subsequently elected, there is an impermissible risk that the judge will no longer view that issue impartially. Indeed, even if that judge is not

influenced by those campaign assertions, it is possible he or she will lean over backwards the other way to compensate for their perceived bias. In either event, the judicial process, which must be perceived as fair and impartial, is irreparably tainted.

Thus, courts which have considered judicial canons written or construed similar to Florida's present canons have almost universally upheld them as constitutional. This is so both with respect to Canons 7(A)(3)(d)(i) and (ii) (which prohibits committing to a position on issues likely to come before the court) and Canon 7A(3)(d)(iii) (which prohibits knowing misrepresentations in judicial campaigns). In *Ackerson v. Kentucky Judicial Retirement and Removal Commission*, 776 F. Supp. 309 (W.D. Ky. 1991), *Stretton v. Disciplinary Board of the Supreme Court of Pennsylvania*, 944 F. 2d 137 (3d Cir. 1991), and *Republican Party of Minnesota v. Kelly*, 63 F. Supp. 2d 967 (D. Minn. 1999), the courts all upheld the substantial equivalents of Canons 7(A)(3)(d)(i) and (ii). Those decisions recognize that First Amendment concerns must be balanced against other equally compelling considerations unique to the judiciary, including litigants' constitutional right to a fair and impartial tribunal. *See also Deters v. Judicial Retirement & Removal Commission*, 873 S.W. 2d 200 (Ky. 1994) and *Summe v. Judicial Retirement &*

Removal Commission, 947 S.W. 2d 42 (Ky. 1997); *In the Matter Haan*, 676 N. E. 2d 740 (Ind. 1997)[19]

The rationale for prohibiting judicial candidates from knowingly misrepresenting the facts or purposefully misleading the public is equally compelling. False or misleading statements that cause the public to question the honesty or impartiality of the judiciary undermine the most fundamental principles upon which the judicial system depends for its legitimacy and effective functioning. Thus, any contention that Judge McMillan had a First Amendment right to knowingly misrepresent the record of an incumbent judge is absurd. Knowingly false and misleading statements are not constitutionally protected speech. "[A] calculated lie about a public official, or a statement uttered out of reckless inattention to its falsity, is beyond the pale of

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[19] Judge McMillan's reliance on *Buckley v. Illinois Judicial Inquiry Board*, 997 F.2d 224 (7th Cir. 1993), is misplaced. That case, contrary to the majority view expressed in the cases cited, *supra* invalidated a prior form of Canon 7 which prohibited "announcing views on disputed legal or political issues." That is not this case. The canon in question has since been amended to narrow its application to issues "likely" to come before the court. There, the plaintiffs did not argue that the state was constitutionally prohibited from placing greater restrictions on the campaign utterances of judicial candidates than on the campaign utterances of candidates for other types of public office. And that court conceded that judges remain different from legislators and executive officials in ways that bear on the strength of the state's interest in restricting their freedom of speech. *Id*. at 228. In no way has the Hearing Panel in this case imposed complete silence on Judge McMillan. It has balanced his right to speak against the due process interests of litigants and the necessity of public perception of an independent and impartial judiciary.

constitutional protection." *Pierce v. Capital Cities Communications, Inc.*, 576 F. 2d 495, 506 (3d Cir.), *cert. denied*, 439 U.S. 861 (1978).[20]

X. THE HEARING PROPERLY FOUND JUDGE MCMILLAN GUILTY AS CHARGED IN THE OCURA MATTER

The Hearing Panel found that Judge McMillan was guilty of violating Canons 1, 2(A), 3B(1) and 3(E) based on his conduct in the Ocura matter. *See* Findings at 12. In so ruling, the Panel reasoned that "[w]hen a judicial officer is a witness and then intentionally interjects himself into a judicial ruling, even on preliminary matters, the public's confidence in the neutrality and impartiality of the judicial system is severely and adversely impacted." *See* Findings at 36. In a somewhat qualified concession, Judge McMillan concedes that his conduct in Ocura "could be construed as a violation of the [applicable] Canons;" however, he contests "the JQC's characterization of his candor and sinister intent" in handling Mr. Ocura's first appearance. *See* McMillan Response at 55.[21]

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[20] Although a knowingly false or misleading representation regarding an opponent's performance in office is political speech, it is not protected by the First Amendment. *Brown v. Hartlage*, 456 U.S. 45, 60 (1982).

[21] This argument is without merit. Intent is not an element of Canon 3's prohibition against judges presiding over any matters in which their impartiality might be questioned or they know are likely to be a material witness.

Judge McMillan acknowledges that on January 30, 2000 he observed a vehicle driven by Guadalupe Ocura operating in an erratic manner and telephoned the Florida Highway patrol on his cellular phone. *See* McMillan Response at 55; (T:1 -178-79). Mr. Ocura was then stopped and arrested, and Judge McMillan provided the arresting officer with a witness statement. *Id;* JQC Appendix at 15. Mr. Ocura's first appearance was scheduled in county court the next morning in front of Judge Robert Farrance. Judge Farrance was the only judge assigned to handle first appearances the week of January 31 - February 4, 2000. (T:3-473). Judge McMillan admitted that he was assigned to the county civil division at the time and that his normal duties in the county civil division did not include presiding over first appearances. (T:1-178).

On the morning of January 31st, Judge McMillan went to the video hearing room where first appearances are held and spoke with Valerie Rosas, the first appearance clerk. Judge Farrance had not yet arrived at that time. Ms. Rosas testified that Judge McMillan told her that on the previous night, he was" behind somebody that was driving under the influence and how he had called the Florida Highway Patrol and then they took over from there." (T:3-475). Judge McMillan specifically asked Ms. Rosas about Mr. Ocura's blood alcohol level. (T:1-181). Ms. Rosas testified that she handed Judge McMillan the paperwork that would have included Mr. Ocura's blood alcohol test results, and she observed him review that paperwork. (T:3-479).

According to Ms. Rosas, after Judge Farrance entered the video hearing room, "Judge McMillan asked Judge Farrance if he wanted him to take over" the first appearance calendar. (T:3-477). Both Ms. Rosas and Judge Farrance testified that Judge McMillan initiated the conversation. (T:3-478, 487-88). Judge Farrance testified that he initially rejected Judge McMillan's offer, but after Judge McMillan persisted in making the same offer two or three times, he acquiesced and agreed to let Judge McMillan take over. (T:3-488-89).[22] At that time, Judge Farrance (unlike Judge McMillan) was not aware that Mr. Ocura's case was on the first appearance docket that morning or that Judge McMillan was a material witness in the case. (T:3-489-90). During the course of the first appearance hearing, Judge McMillan was aware of the ethical prohibition against his presiding over Mr. Ocura's first appearance hearing. He, in fact, stated during open court in that proceeding:

> "I'm the guy that was behind you in the car that called the police and had you arrested. So I am probably not a good person to address the issue of your bond except that you blew over a .30 and, quite frankly sir, you almost hit several cars and . . . At one point you made a u-turn and I thought you were going to run head on into to me."

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[22] Judge McMillan disputed that he asked Judge Farrance more than once whether he wanted him to take over first appearances that day. (T:1-182). All parties agreed that Judge McMillan approached Judge Farrance and offered to handle his first appearances. The panel accepted Judge Farrance's version of this episode.

After disclosing the conflict on the record, Judge McMillan "passed" on the case until it could be handled by another judge the following day. Nonetheless, he set a $100,000 bond (which Judge Farrance testified he believed was excessive under the guidelines and applicable law) and Mr. Ocura remained jailed. (T:3- 490-492).

Based on the foregoing testimony, the Panel was fully justified in finding that Judge McMillan had violated the cited ethical rules. Additionally, the Panel also found that "Judge McMillan [was] untruthful on a specific matter on which he was charged. *See* Findings at 36. This finding was based on the following colloquy during Special Counsel's examination of Judge McMillan:

> *Q. You were aware when you took the first appearance calendar that Mr. Ocura would be one of the defendants to be arraigned?*
>
> *A:* ***I will tell you, quite frankly, by the time I got finished with my conversation with Farrance, I had forgotten all about Ocura.***

(T:1-181) (emphasis added). Based on this testimony, the Hearing Panel concluded that Judge McMillan's testimony that he had "forgotten" Mr. Ocura would be on the first appearance docket was untruthful. The unrefuted testimony of both Ms. Rosas

and Judge Farrance establishes that Judge McMillan was aware Mr. Ocura's case was on the docket when he offered to assist Judge Farrance.[23]

XI. THE HEARING PANEL'S RECOMMENDED DISCIPLINE OF REMOVAL IS APPROPRIATE AND SUPPORTED BY THE RECORD

Article V, Section 12(a)(1), Florida Constitution, authorizes the JQC to recommend removal of any judge whose conduct during his or her term of office or otherwise, demonstrates a present unfitness to hold office. Judge McMillan contests the Hearing Panel's recommendation of removal because he contends, in effect, that his mistakes were minor and technical, that his conduct on the bench has been exemplary, and that he is appropriately remorseful for his conduct. He further contends that there was a total absence of evidence of his present unfitness to hold office. *See* McMillan Response at 5, 64, 68.

To place the Panel's recommendation in context, one must first summarize certain of the Hearing Panel's findings. The Panel concluded there was clear and convincing evidence that Judge McMillan engaged in an inappropriate pattern of campaign conduct by: i) making pledges and promises of conduct in office through

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[23] Irrespective of whether this Court chooses to accept Judge McMillan's explanation that he did not really mean to say "forgotten" when he so testified at trial, it is immaterial to his guilt as to the underlying charge because there is no *mens rea* requirement under Canon 3.

multiple items of campaign literature in which he expressly or impliedly committed to favoring law enforcement; and ii) making knowingly false misrepresentations, including major misstatements relative to his incumbent opponent, Judge George Brown.

The misrepresentations as to Judge Brown included deliberately false assertions that Judge Brown was a part-time judge and "off from court" for almost three months a year. Judge McMillan's campaign literature also stated that the judicial system in Manatee County was overloaded, at least in part, because of Judge Brown's working hours. Perhaps most deceptive was that Judge McMillan's "days off from court" calculation deliberately included no consideration for the time Judge Brown spent handling a variety of judicial duties which did not necessitate his physical presence on the bench in county criminal court.

In addition, among other misrepresentations, the Hearing Panel found that Judge McMillan falsely contended that Judge Brown: i) had sought and received favors from law enforcement and preferential treatment for his children; ii) failed to enforce a geographical relocation statute that does not even exist; iii) was implicitly responsible for the failure in collection of millions of dollars of unpaid costs and fines although most of the uncollected amounts arose out of circuit felony matters over which Judge Brown had no jurisdiction; and iv) was soft on crime because he had tried but 300 jury cases over his career out of some 91,000 cases.

Judge McMillan's Response is replete with apologies for some of his conduct. Notwithstanding this partial epiphany, however, he still refuses to concede fault for the most blatant aspect of his conduct, which was his relentless and false attacks on Judge Brown's work ethic. With respect to those misrepresentations, he maintained on both the first *and* last days of the trial that he believed his attacks on Judge Brown's work ethic were "truthful." (T:1-151); (T:9-1405). In a similar vein, when asked whether he regretted writing a letter to the Manatee County Sheriff in which he confirmed his "commitment to support [his] officers' efforts from the bench," Judge McMillan refused to express any regret. (T:1-127).[24] *See Graham*, 620 So. 2d at 1276 ("A judge who refuses to recognize his own transgressions does not deserve the authority or command the respect necessary to judge the transgressions of others.").[25]

Finally, Judge McMillan's contention that his innovations and improvements while on the bench justify his continuation as a member of the judiciary are equally without merit. In this Court's decision in *Alley*, the Court made it clear that

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[24] *See* JQC Appendix at 6.

[25] Judge McMillan's argument that his campaign misconduct and conduct in *Ocura* were innocent mistakes is not a ground to avoid removal. Even if the purposefulness of his conduct were not clear – which it was – Section 12(c)(1) of Article V makes it clear that mala fides, scienter and moral turpitude are not required for the removal of a judge whose conduct demonstrates a present unfitness to hold office. *See also In re Damron*, 487 So. 2d 1, 6 (Fla. 1986); *In re Graham*, 620 So. 2d 1273 (Fla. 1993).

disciplinary action should not reward serious election misconduct by allowing "one guilty of such egregious misconduct to retain the benefits of the violations and remain in office." *Alley*, 699 So. 2d at 1370 (Fla. 1997). Moreover, in prior cases relating to lawyer discipline, the Court has noted that discipline should be sufficiently severe to deter others from similar misconduct. *See, e.g., The Florida Bar v. Gersten*, 707 So. 2d 711, 713 (Fla. 1998).

Considering the totality of the circumstances, including the egregious nature of his campaign misconduct and his bizarre conduct in *Ocura*, Judge McMillan has engaged in a pattern of behavior that should not be rewarded and that demonstrates present unfitness to hold office. Any contention that his misdeeds can be remedied by some form of punishment less than removal is belied by the record. Judge McMillan blatantly violated common sense as well as the applicable judicial canons by inserting himself into the *Ocura* bond hearing. He did so within a few weeks of stipulating to a reprimand and period of unpaid suspension for his prior campaign conduct. Certainly, the Panel was entitled to consider this evidence of his inability or refusal to modify his pattern of conduct. *In re Graziano*, 696 So. 2d 744, 753 (Fla. 1997). The Chief Judge of the Twelfth Judicial Circuit, Thomas A. Gallen, was likewise clear in his testimony that based upon Judge McMillan's lack of candor and conduct on the bench, he was unfit to continue to serving as a County Judge in

Manatee County, Florida. (T:5-525-535, 537-538, 576-585, 593-598, 619-627, 634-635)

Moreover, the Panel had the opportunity of observing Judge McMillan during the four days of trial. In doing so, they were able to consider his demeanor on the stand and form their own conclusions concerning his candor and remorse. The contention that there is no evidence that Judge McMillan is presently unfit to hold office (*see* Response at 5, 64, 68), is, therefore, contradicted by the Hearing Panel's conclusions after observing and interrogating him. *See* McMillan Response at 5, 64, 68. Accordingly, the Hearing Panel was correct, on this record, in concluding that Judge McMillan's past and potential injury to the judicial system can only be remedied by removal.[26]

[26] Judge McMillan also argues that Canon 1, 2, and 3 do not govern his conduct before he became a judge. This Court has consistently rejected arguments that pre-judicial acts may not be used as a basis for discipline or removal of a judge. *See Davey*, 645 So. 2d at 403 and the cases cited therein.

CONCLUSION

For the foregoing reasons, its is respectfully submitted that the Findings, Conclusions, and Recommendations of the Hearing Panel of the Judicial Qualifications Commission be approved.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing **REPLY BRIEF** has been furnished by U.S. Mail to **BROOKE S. KENNERLY,** Executive Director, Judicial Qualifications Commission, The Historic Capitol, Room 102, Tallahassee, FL 32399-6000; **THOMAS C. MacDONALD, JR., ESQ.**, General Counsel, 100 N. Tampa Street, Suite 2100, Tampa, FL 33602; **THE HONORABLE JAMES R. JORGENSON**, Third District Court of Appeal, 2001 SW 117th Avenue, Miami, FL 33175-1716; **JOHN R. BERANEK, ESQ.,** Counsel, Hearing Panel, Ausley & McMullen, 227 South Calhoun St., P.O. Box 391, Tallahassee, FL 32301; **THE HONORABLE MATTHEW E. MCMILLAN**, 3311 46th Plaza East, Bradenton, FL 34203; **ARNOLD D. LEVINE, ESQ.**, Levine, Hirsch, Segall & Brennan, P.A., 100 S. Ashley Dr., Suite 1600, Tampa, FL 33602; and **SCOTT K. TOZIAN, ESQ.**, Smith and Tozian, P.A., 109 N. Brush St., Suite 150, Tampa, FL 33602, on March ____, 2001.

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CERTIFICATE OF COMPLIANCE

I HEREBY CERTIFY that this Brief complies with the requirements of Fla. R. App. P. 9.210. The font used in this brief is Times New Roman 14.

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